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FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463

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**CELA**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 6510  
DATE COMPLAINT FILED: Nov. 15, 2011  
DATE OF NOTIFICATION: Nov. 22, 2011  
LAST RESPONSE RECEIVED: Jan. 4, 2012  
DATE ACTIVATED: Jan. 31, 2012

EXPIRATION OF SOL: Nov. 9, 2013 – Nov. 18, 2015

**COMPLAINANT:**

Kimberly A. Vertolli

**RESPONDENTS:**

Kirk for Senate and Frank Considine  
in his official capacity as treasurer  
Senator Mark Kirk  
Dorothy McCracken  
Robert Edward Vail, Jr.  
Van Ness Communications  
The Patterson Group

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 439a(b)  
2 U.S.C. § 434(b)(5)(A) and (6)(A)  
11 C.F.R. § 113.1(g)  
11 C.F.R. § 104.3(b)(4)(i) and (vi)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

Kirk for Senate (the "Committee") was Senator Mark Kirk's principal campaign committee for the Senate race in Illinois during the 2010 election. Complainant, who is Kirk's ex-wife, alleges that between 2008 and 2011, Respondents "willfully or unwittingly misused, converted" or failed to report between \$50,000 and \$1.8 million of the Committee's campaign funds, in violation of the Federal Election Campaign Act of 1971, as amended, (the "Act"), and Commission regulations.

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1 According to the Complaint, Dorothy McCracken, allegedly Kirk's girlfriend during the  
2 relevant period, "steered" the Committee to contract for advertising work with The Patterson  
3 Group, the company of her former business partner, Robert Edward Vail, Jr. The Committee  
4 allegedly paid Patterson Group \$1.8 million in 2009-10 under this contract. Compl. ¶¶ 14, 19  
5 (Nov. 14, 2011). And Patterson Group, in turn, sub-contracted with McCracken's company, Van  
6 Ness Communications ("Van Ness"), and paid Van Ness between \$50,000 and \$200,000 for  
7 consultant fees and expenses, which allegedly were passed through Patterson Group and paid for  
8 with the Committee's funds, and not reported by the Committee as itemized expenditures to a  
9 vendor's sub-contractor. *Id.* ¶¶ 7-8. At least \$135,000 of Van Ness's bills, according to  
10 Complainant, were for McCracken's personal expenses. *Id.* ¶ 20, Ex. D. The Complaint further  
11 alleges that after 2009, McCracken shared a residence with Kirk, making her a member of the  
12 candidate's family within the meaning of the Commission's personal use regulations. *Id.* ¶¶ 12-  
13 13, 22. Finally, the Complaint alleges that even if McCracken provided campaign-related media  
14 services in exchange for the payments she received from Patterson Group, her services were not  
15 *bona fide* and the payments exceeded the fair market value rate and therefore constituted  
16 conversion of committee funds to personal use. *Id.* ¶¶ 12-13, 17, 22.

17 Kirk and the Committee, Vail, and McCracken each responded separately.  
18 Committee/Kirk Resp. (Jan. 4, 2012); Vail Resp. (Jan. 6, 2012); McCracken Resp. (Jan. 3, 2012).  
19 Their Responses maintain that Patterson Group and McCracken provided *bona fide* services.  
20 Committee/Kirk Resp. at 1, 3-4; Vail Resp. at 2; McCracken Resp. at 1. Kirk and the Committee  
21 maintain that the Committee properly disclosed all payments to Patterson Group and the  
22 Committee was not obligated to disclose any payments that the Patterson Group made to

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1 subcontractors. Committee/Kirk Resp. at 2-3. None of the Responses addressed the specific  
2 items that the Complaint alleges were McCracken's personal expenses paid by the Committee.

3 We recommend that the Commission find no reason to believe that any of the  
4 Respondents violated 2 U.S.C. § 439a(b) by converting campaign funds to "personal use" based  
5 on the allegations that McCracken was a member of Kirk's family who did not provide *bona fide*  
6 services at fair market value or on the alleged Committee payments for McCracken's travel,  
7 meals, transportation, lodging expenses, a dental bill, clothing, and cosmetics. We further  
8 recommend that the Commission dismiss the allegations that the Respondents violated 2 U.S.C.  
9 § 439a(b) by converting campaign funds to "personal use" through possible Committee  
10 payments for McCracken's gym membership. *See Heckler v. Chaney*, 470 U.S. 821 (1985). We  
11 also recommend that the Commission find no reason to believe that the Committee violated  
12 2 U.S.C. § 434(b) by failing to report Patterson Group's payments to its subcontractor, Van Ness.

## 13 II. FACTUAL SUMMARY

14 According to the Complaint, McCracken, Kirk, Vail, and the Committee violated the Act  
15 by "concoct[ing] a scheme" to impermissibly convert to personal use committee funds from  
16 Kirk's principal campaign committee for the 2010 Illinois Senate race. Compl. ¶¶ 14-15. The  
17 Complaint further alleges that in 2009, McCracken and Kirk cohabitated at Kirk's Illinois  
18 residence; therefore, the \$135,000 in campaign funds paid to her company Van Ness through  
19 Patterson Group for her salary and personal expenses while she accompanied Kirk during his  
20 senate campaign were prohibited personal use of campaign funds. Compl. ¶¶ 17, 20.<sup>1</sup>

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<sup>1</sup> In further support of her allegation that Respondents conspired to violate the Act, the Coreplaint alleges that Vail and McCracken were business partners prior to 2008 (and throughout Kirk's senate campaign) in a company called Arcadian Partners, and that this company's website no longer includes McCracken's biographical summary; that Patterson Group is not registered to do business in Illinois; and, that according to the Virginia State Corporation Commission, McCracken appears to run Van Ness from her home in Arlington, Virginia. Compl. ¶¶ 9, 10, 19.

1 McCracken states that she lived in Arlington, Virginia throughout the Senate campaign,  
2 "working on site as needed at The Patterson Group and the campaign in Illinois." McCracken  
3 Resp. at 1. Respondents maintain that the Committee received *bona fide* services from Patterson  
4 Group for the work it performed from July 2009 through September 2010; that Patterson Group  
5 and Vail had provided media services to past Kirk campaigns, which shows that they were not  
6 retained by the Committee as a result of any "scheme"; and that McCracken, through Patterson  
7 Group, assisted "with the media placement services with the input she received from the  
8 campaign during regular conference calls and meetings with Campaign staff and other vendors."  
9 Committee/Kirk Resp. at 1, 3-4; Vail Resp. at 1-2; McCracken Resp. at 1-2.

10 **A. McCracken's Reimbursed Expenses**

11 McCracken's reimbursed expenses — which were not addressed by the Responses —  
12 included travel, meals, transportation, lodging, and other personal expenses, including teeth  
13 whitening, gym membership, cosmetics, and clothing. Compl., Exs. C, D. Exhibit C includes  
14 Van Ness invoices to Patterson Group, while Exhibit D purports to show various vendor bills and  
15 receipts to McCracken, including for travel, meals, transportation, and lodging. Ex. D. at 78-100.

16 Other reimbursed expenses include:

- 17 • a "Membership Contract," with the handwritten notation "KFS billed" at the top,  
18 between a health and fitness center and McCracken dated July 8, 2010, for an  
19 enrollment fee of \$50 and 11 sessions of personal training costing \$566.50,  
20 payable at \$79 per month beginning August 1, 2010, Compl., Ex. D. at 103-04;  
21
- 22 • a Marshall's receipt dated August 26, 2010, for \$14 in "accessories" and \$20 for  
23 "ladies ftwr," Compl., Ex. D. at 106;  
24
- 25 • an "Attending Doctor's Statement" and "Statement of Services Rendered" to  
26 McCracken, dated November 18, 2010, totalling \$425, for "whitening gel 10%"  
27 and various dental services, Compl., Ex. D. at 109-10;  
28

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- a Target receipt, dated August 1, 2010, that includes a charge for "health-beauty-cosmetics" of \$9.54, Compl., Ex. D. at 105; and a CVS receipt dated June 19, 2010, containing charges for several cosmetic and personal grooming items at a combined cost of \$154.21, Compl., Ex. D. at 101.<sup>2</sup>

**B. Media Services Provided to the Committee by Patterson Group and Van Ness**

The Complaint generally questions whether McCracken provided *bona fide* services to the campaign. Compl. ¶¶ 16-17, 22. In response, the Committee provided a sworn affidavit from its 2010 senate campaign manager Eric Elk stating that the Committee hired Patterson Group as a vendor to provide various media and advertising services for Kirk's 2010 Illinois race. Committee/Kirk Resp., Ex. A. ¶¶ 3-4.<sup>3</sup> Elk also states that McCracken, through Patterson Group, "participated in daily and weekly calls discussing [the Committee's] message management, content for radio and TV ads, and when the campaign should deliver specific messages to voting groups" and "participated in discussions reviewing statewide polling data, editorial board and speech preparation, and other strategic message development, including working with Mr. Vail concerning when and where to deliver [the Committee's] communications." Committee/Kirk Resp., Ex. A. ¶ 5.

Vail — sole proprietor of Patterson Group since 1998 — confirms the Committee's characterization of Patterson Group's role. Vail Resp. at 1-2. Vail also states that he met Kirk and McCracken in 1999, when, as a media buyer and planner, he solicited work from Kirk's congressional campaign and that he worked on Kirk's subsequent five campaigns in that

<sup>2</sup> The Complaint also alleges that Kirk may have violated the House Ethics Rules by accepting a trip to England and Greece during November 2008, paid for by McCracken. Compl. ¶ 11, Exs. A, K. There is no allegation or information that any campaign funds were used in connection with this activity. Since the Commission has no jurisdiction over violations of House Ethics Rules, we do not address this allegation.

<sup>3</sup> The Committee asserts that from July 2009 through September 2010, Patterson Group placed media, and provided schedules and suggestions for "the best times for ads to air for greatest impact and [to] make the most efficient use of campaign funds." Committee/Kirk Resp., Ex. A. ¶¶ 3-4.

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1 capacity. *Id.* at 1-2. Vail's Response acknowledges that Patterson Group contracted with a sub-  
2 vendor, Van Ness, owned by McCracken.<sup>4</sup> *Id.* at 2. According to Vail, McCracken supervised  
3 the "radio and television advertising development and production" for Kirk's 2010 Senate  
4 campaign and provided Patterson Group with guidance on media selection strategies and  
5 advertising markets. *Id.* at 2. Vail states that he and McCracken maintained nearly daily contact  
6 during the assignment. *Id.*

7 In her Response, McCracken states that while working with Patterson Group, she  
8 "prepared strategic and crisis communication plans, provided branding and marketing counsel,  
9 including message development, media planning, placement and scheduling, and rapid response  
10 advice," and that she "worked across TV, radio, print and internet platforms," "recruited key  
11 members of the campaign's strategic communications team," and participated in its daily  
12 strategy call and nearly all its key meetings, "working well in excess of a 40-hour workweek,  
13 many times seven days a week." McCracken Resp. at 1.

14 According to McCracken, Patterson Group paid her a monthly retainer of \$10,000 (less in  
15 August-October 2009), with reimbursements for agreed-upon expenses related to campaign  
16 travel and other activities. McCracken Resp. at 1. She provided the following chart showing the  
17 amount of consulting fees and expenses that Van Ness invoiced to Patterson Group:

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<sup>4</sup> None of the Responses provided a copy of Patterson Group's contract with Van Ness or the Committee's contract with Patterson Group.

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Date	Expenses Invoiced to Patterson Group	Consulting Fees Invoiced to Patterson Group
Aug. 16, 2009	\$1,914.34	\$2,500
Sept. 26, 2009	\$3,807.01	\$2,500
Oct. 26, 2009	\$1,030.26	\$5,000
Nov. 25, 2009	\$2,569.50	\$10,000
Dec. 13, 2009	\$4,161.29	\$10,000
Jan. 11, 2010	\$1,438.16	\$10,000
Feb. 13, 2010	-----	\$10,000
Mar. 2, 2010	\$4,937.17	\$10,000
Apr. 1, 2010	\$2,634.55	\$10,000
May 3, 2010	\$1,160.37	\$10,000
June 1, 2010	-----	\$10,000
July 1, 2010	\$6,392.67	\$10,000
July 30, 2010	\$3,537.00	-----
Aug. 10, 2010	-----	\$10,000
<b>Sub Totals</b>	<b>\$33,582.32</b>	<b>\$110,000</b>
<b>Grand Total</b>		<b>\$143,582.32</b>

1  
 2 *Id.* at 1-2.<sup>5</sup>

3  
 4           Regarding these payments, the Complaint alleges that McCracken “was compensated at a  
 5 level far exceeding the market value of her ‘services’” given her allegedly “low salary history,  
 6 lack of education and experience, and exorbitant pay, relative to [other] professionally  
 7 credentialed, educated, yet lower paid” Committee consultants. Compl. ¶¶ 16-17, 22. In

<sup>5</sup> Patterson Group’s last payment to McCracken was in September 2010. *Id.* McCracken’s Response does not describe or provide the underlying documentation for her invoiced expenses. None of the Responses provides any other documentation relating to Patterson Group’s payments to Van Ness.

1 rebuttal, McCracken states that she has served as a public relations and political consultant for a  
2 variety of clients for over 25 years. McCracken Resp. at 1. She worked on Kirk's first  
3 congressional campaign in 1999-2000 and ran his district office communications. *Id.*

4 The Complaint further alleges that "[w]hatever legitimate 'services' [McCracken] did  
5 perform, [they] appear to have been purposely concealed from public disclosure," because they  
6 were not reported by the Committee. Compl. ¶ 22. In response, Kirk and the Committee  
7 maintain that the Committee properly disclosed payments to its media vendor, Patterson Group,  
8 with which the Committee contracted, and that Patterson Group used a sub-vendor, Van Ness, to  
9 assist with its media placement and message management service. Committee Resp. at 2-3. In  
10 addition to the Patterson Group, in August 2010, the Committee hired another media vendor,  
11 Mentzer Media, to assist with strategic political campaign and placement. Committee/Kirk  
12 Resp., Ex. A. ¶ 4. The Committee asserts that "[t]here is no credible basis for a reporting  
13 violation against the campaign since there is no statutory, regulatory or other Commission  
14 precedent requiring the Campaign to disclose payments made by a primary vendor to that  
15 vendor's sub-vendors." *Id.* at 3.

### 16 III. LEGAL ANALYSIS

#### 17 A. A Reason to Believe Finding is Not Warranted for Alleged Violations of the 18 Act's "Personal Use" Prohibitions 19

20 The Act prohibits the conversion of campaign funds to personal use. *See* 2 U.S.C.  
21 § 439a(b)(1). Generally, "personal use" is defined as "a commitment, obligation or expense of  
22 any person that would exist irrespective of the candidate's campaign or duties as a Federal office  
23 holder." 11 C.F.R. § 113.1(g); *see* 2 U.S.C. § 439a(b)(2).<sup>6</sup> The Commission's regulation

<sup>6</sup> The personal use restriction applies to "funds in a campaign account in a present or former candidate," 11 C.F.R. § 113.1(g), and thus would not apply to any *bona fide* payments from a contractor's funds to a sub-

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1 enumerates certain expenses that are considered *per se* "personal use" and thus prohibited,  
2 including "[s]alary payments to a member of the candidate's family, unless the family member is  
3 providing *bona fide* services to the campaign." Even "[i]f a family member provides *bona fide*  
4 services to the campaign, any salary payment in excess of the fair market value of the services is  
5 personal use." 11 C.F.R. § 113.1(g)(1)(i)(H). The regulation defines "a member of the  
6 candidate's family" for purposes of paragraph (g) as including "a person who shares a residence  
7 with the candidate." 11 C.F.R. § 113.1(g)(7)(iv). The Commission chose to use a settled  
8 standard such as "residence or domicile" — not a standard that evaluated the closeness or  
9 intimacy of a relationship — to define "family member" for purposes of personal use. *See*  
10 Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds,  
11 67 Fed. Reg. 76,962, 76,974 (Dec. 13, 2002) ("2002 Personal Use E&J").

12 1. McCracken Does Not Appear to Meet the Regulatory Definition of a  
13 "Member of the Candidate's Family"

14 The Complaint alleges that McCracken resided with Kirk at his Illinois home during his  
15 Senate campaign. *See* Compl. ¶ 12; Ex. A at 16 (listing one of McCracken's two possible  
16 addresses as the same as Kirk's Illinois address). As a consequence, the Complaint claims that  
17 McCracken was a "family member" for purposes of the "personal use" provisions and that the  
18 Committee's payments for the services violated that provision because McCracken was paid an  
19 amount "far exceeding the market value of her 'services.'" Compl. ¶ 22. The Complaint does  
20 not state how she knows McCracken and Kirk shared a residence but appears to rely on  
21 information obtained through a background search she conducted on the internet website,

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contractor. *See also* III.B., *infra*. We analyze the transactions from Patterson Group to Van Ness, however, because the Complaint alleges that those transactions were part of a "scheme" to "conceal[] the actual use" of the Committee's funds. Compl. ¶¶ 5, 15.

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1 www.peoplesmart.com, that lists one of McCracken's addresses as the same as Kirk's address.<sup>7</sup>

2 Compl., Ex. A at 16.

3 McCracken's Response states that she lived in Arlington, Virginia throughout the  
4 campaign. McCracken Resp. at 1. And documentary evidence in the record is consistent with  
5 her statement that she did not reside with Kirk. Her Arlington address appears on the receipts  
6 attached to the Complaint as her billing address, with the exception of the gym membership  
7 contract.<sup>8</sup> And although that contract lists an Illinois address, it is not the same address where,  
8 according to the Complaint, Kirk resides and where he was allegedly cohabitating with  
9 McCracken.<sup>9</sup>

10 In promulgating the personal use regulation, the Commission did not define the phrase  
11 "shares a residence." But the Commission sought to avoid an evaluation of each relationship; it  
12 instead implemented a standard based on a shared residency or domicile. *Id.* Under this  
13 standard, we cannot conclude that McCracken's residency or domicile was the same as Kirk's.  
14 Rather, as the record demonstrates, McCracken resided in Virginia; Kirk in Illinois. Any claim  
15 that the Committee violated the Act's personal use provisions by paying McCracken as a

<sup>7</sup> McCracken submitted for reimbursement to Patterson Group lodging expenses she incurred while working in Illinois for the campaign. Compl., Ex. D at 78-79, 88, 98, 102. Based on the receipts dated from November 2009, through July 2010, McCracken stayed at the Courtyard Marriott in Highland Park, IL on three separate occasions and at the W Chicago City Center on another occasion. *Id.* The invoices contain McCracken's name, number of guests as one, and appear to have been paid for with her credit card. *Id.* One of the receipts from the hotel in Highland Park, IL contains her Arlington address. *Id.*, Ex. D at 102. The other receipts do not mention any address. *Id.*, Ex. D. at 78-79, 88, 98. The Complainant does not explain these reimbursed lodging expenses in Illinois and the Respondents do not address them.

<sup>8</sup> The address on the contract appears to be that of Caryn E. Garber, the other signatory, and a past congressional aide to Kirk. See [http://www.legistorm.com/person/bio/14359/Caryn\\_E\\_Garber.html](http://www.legistorm.com/person/bio/14359/Caryn_E_Garber.html); see also <http://www.city-data.com/lake-county/M/Mulberry-Place-4.html> (last visited Feb. 15, 2013).

<sup>9</sup> The Joint Response filed by Kirk and his Committee does not address the residence issue, although Kirk's statement of candidacy lists his Illinois address.

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1 "member of the candidate's family" is not supported by the facts presently before the  
2 Commission.

3 2. Patterson Group and Van Ness Appear to Have Provided *Bona Fide*  
4 Media Services at Fair Market Value to the Committee in Connection with  
5 the 2010 Illinois Senate Race  
6

7 Even if McCracken had qualified as a "member of the candidate's family" under  
8 11 C.F.R. § 113.1(g)(7)(iv), the record does not provide reason to believe that McCracken failed  
9 to provide *bona fide* services at fair market value to the campaign. The allegations that  
10 McCracken did not provide *bona fide* services at fair market value rest on Complainant's  
11 assessment of McCracken's credentials and on Complainant's assertions regarding payments to  
12 other Committee consultants; the removal of information on a website concerning McCracken's  
13 past business relationship with Vail; Patterson Group's lack of registration in Illinois; and the  
14 operation of Van Ness from McCracken's home. These factors, however, do not suffice to  
15 provide reason to believe that McCracken was compensated at more than her fair market value.

16 To the contrary, the record undercuts the claim that McCracken was paid more than fair  
17 market value for her services. Both Vail and the Committee describe a long history of Vail's  
18 work for Kirk even before Kirk ran for the U.S. Senate, undermining the claim that the  
19 Committee's contract with Vail was part of a "scheme:" Vail Resp. at 1; Committee Resp. at 3-  
20 4. This history includes Vail's business association with McCracken prior to 2009, Vail Resp. at  
21 1; McCracken's work history in public relations and political consulting, McCracken Resp. at 1;  
22 and the services provided to Kirk's Senate campaign by Vail, McCracken and Committee  
23 campaign manager Elk, as described in Elk's affidavit. Vail Resp. at 2, McCracken Resp. at 1,  
24 Committee/Kirk Resp., Ex. A. ¶ 5. Other than Complainant's unsupported opinion on the  
25 weakness of McCracken's credentials, there is no information in the record suggesting that

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1 McCracken did not provide *bona fide* services to the Committee or that those services were  
2 compensated at more than fair market value. We therefore recommend that the Commission find  
3 no reason to believe the Committee, Kirk, McCracken, Vail, Patterson Group and Van Ness  
4 violated 2 U.S.C. § 439a(b).

5 3. Payments for Alleged *Per Se* Personal Use Either Do Not Appear to Have  
6 Been Reimbursed With Committee Funds or Were Incurred Outside of the  
7 Sub-Vendor's Billing Period  
8

9 *Per se* "personal use" also includes clothing (other than items of *de minimis* value) and  
10 payments to a health club or recreational facility. See 11 C.F.R. § 113.1(g)(1)(i)(C),(G). In  
11 support of Complainant's allegations that Committee funds may have been used to pay  
12 McCracken for specific items that constituted "personal use," Complainant provided bills and  
13 receipts for items that, if paid for by the Committee, would be "*per se* personal use." See  
14 Compl., Ex. D; see also 2 U.S.C. § 439a(b); 11 C.F.R. § 113.1(g)(1)(i)(C),(G).

15 The Responses do not address these alleged *per se* personal use expenses. Even so —  
16 with the lone exception of a gym membership invoice that includes the handwritten notation  
17 "KFS billed" — the Complaint lacks information that would link these items in McCracken's  
18 invoices to Patterson Group and then from Patterson Group's invoices to the Committee. Nor is  
19 there any information showing that the Committee's made payments for such personal expenses  
20 to Patterson Group.

21 There are seven receipts provided: a gym membership contract, a dental bill, and  
22 separate receipts from Marshall's, Talbots, Target, CVS, and Walgreens. Some of the receipts  
23 that allegedly demonstrate personal use were for McCracken's expenses that were incurred after  
24 she stopped doing work for the Committee. According to her Response, McCracken ceased  
25 billing Patterson Group for expenses in July 2010, and her final bill in August 2010 was for

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1 consulting fees only. McCracken Resp. at 1-2. With respect to her dental bill, the Complaint  
2 alleges that McCracken “appears to have included teeth whitening . . .” in her billing for  
3 campaign expenses. Compl. ¶ 20. The dental bill itself, however, is dated November 2010, after  
4 she reportedly stopped charging campaign-related expenses to Patterson Group. *Id.*, Ex. D at  
5 109-10. In addition, a Target receipt for cosmetics dated August 1, 2010, and a Marshall’s  
6 receipt for clothing dated August 26, 2010, are both outside of the time period McCracken  
7 asserts that she billed Patterson Group for expenses. *Id.*, Ex. D at 105-06.

8 The remainder of the receipts were incurred during the time period during which  
9 McCracken was reportedly billing expenses to Patterson Group, but there is no information  
10 linking the reimbursement of these receipts with Committee funds. The CVS receipt in the  
11 amount of \$239.21 dated June 19, 2010, includes “cal graph not,” and “cal steno ntb,” items that  
12 may relate to business expenses. Compl., Ex. D at 101. Therefore, it is possible the CVS receipt  
13 was submitted for only these items. We have no explanation for the receipts from Talbots for  
14 clothing in the amount of \$340.73 on July 3, 2010, or Walgreens for cosmetics totalling \$31.48  
15 on November 10, 2009. Compl., Ex. D at 89, 106.

16 Given the sparse record surrounding these receipts, we recommend that the Commission  
17 find no reason to believe that Kirk for Senate and Frank Considine in his official capacity as  
18 treasurer, Senator Mark Kirk, Dorothy McCracken, Robert Edward Vail, Jr., The Patterson  
19 Group and Van Ness Communications violated 2 U.S.C. § 439a(b) by converting campaign  
20 funds to “personal use” through payment for a dental bill, clothing, and cosmetics.

21 The Complaint includes a gym membership contract that — if paid with campaign funds  
22 — would be a *per se* personal use violation. Compl., Ex. D at 103-04. Despite the handwritten  
23 notation “KFS billed” on the document, however, we recommend that the Commission dismiss

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1 these allegations because, to establish reason to believe, we would need to make three factual  
2 inferences that are not supported by the record here. First, to recommend reason to believe  
3 would require us to draw the inference that "KFS" means the "Kirk for Senate" committee. This  
4 inference is a reasonable one. And were it the sole inference necessary to establish a violation,  
5 we think it would support a reason to believe finding, even though we lack information about  
6 who wrote those words and whether the handwritten notation is authentic. But there are two  
7 other necessary inferences that require a further leap – which the record does not justify.  
8 Assuming KFS was Kirk for Senate, we would next need to infer that the notation reflected that  
9 the Committee was in fact directly billed for the expense. And this inference is unsupported by  
10 the record.<sup>10</sup> The third and final required inference would be that the Committee's funds were  
11 used to reimburse the expense. But that inference also lacks support in this record.

12 In short, although the notation "KFS billed" supplies an initial basis to question whether  
13 there was a violation of the Act, the record as a whole simply does not support the other  
14 inferences required to conclude the Committee actually paid for the gym membership, or even  
15 that it was billed. In addition, the amount in question does not justify the use of Commission  
16 resources to pursue an investigation. The contract is dated July 2010, with a \$50 enrollment fee,  
17 but the first monthly payment of \$79 was not due until August 2010. Compl., Ex. D at 103-04.  
18 Because McCracken did not bill Patterson Group for expenses after July 2010, the most that can

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<sup>10</sup> According to the contract, McCracken's credit card was billed for the gym membership. The contract has the last four digits, \_\_\_\_\_, the same as the credit card used for many of McCracken's other receipts. Given that none of the other receipts, which the Complaint also alleges were reimbursed with Committee funds, contain a similar notation, its appearance on the gym membership contract does not give it any additional weight towards proving the Committee was actually billed.

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1 be inferred from the record is that she sought, and based on unsupported surmise may have  
2 received, reimbursement for the contract's up-front cost: a \$50 initiation fee.<sup>11</sup>

3 We, therefore, recommend that the Commission exercise its prosecutorial discretion and  
4 dismiss the allegations that the Committee, Senator Mark Kirk, Dorothy McCracken, Robert  
5 Edward Vail, Jr., The Patterson Group and Van Ness Communications violated 2 U.S.C.  
6 § 439a(b) by converting campaign funds to "personal use" through payment for a gym  
7 membership. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

8 4. There is no Information Supporting the Allegation That Payment for  
9 Travel, Meals, Transportation, and Lodging Were Not Campaign Related

10 The Commission determines on a case-by-case basis, whether other uses of campaign  
11 funds fulfill a commitment, obligation or expense that would exist irrespective of the candidate's  
12 campaign or duties as a federal officeholder, and are therefore personal use, such as meals,  
13 travel, and vehicle expenses. *See* 11 C.F.R. § 113.1(g)(1)(ii); 1995 Personal Use E&J, 60 Fed.  
14 Reg. 7,862 (Feb. 9, 1995).

15 Complainant provided documents allegedly related to the costs of McCracken's travel,  
16 meals, transportation and lodging during the period she worked for Patterson Group. Compl.,  
17 Ex. D at 78-88. Most of these documents are receipts reflecting travel to and from Illinois, and  
18 meals, lodging, and transportation there.<sup>12</sup> Without information supporting the assertion that  
19 McCracken's expenses were not campaign related, the Complaint has failed to demonstrate that  
20

<sup>11</sup> The contract also lists \$566.50 in charges for personal training sessions. But it is unclear whether these costs were paid upfront by McCracken and thus part of the total amount contemplated by the "KFS billed" notation.

<sup>12</sup> The only exceptions are receipts relating to a California trip from December 6 to 9, 2009. While we have not located Kirk's or McCracken's complete schedules for that period, public information indicates that Kirk attended a roundtable discussion sponsored by Gen Next on December 7, 2009, in Newport Beach, California. *See* [http://webcache.googleusercontent.com/search?hl=en&gbv=2&gs\\_l=hp.3...5609123031101235311411411013210101141185917121910.frgbld.&q=cache:RawasIFpgsJ:http://www.gen-next.org/programs/past\\_programs?datemin=1230796800&datemax=1262332800+kirk+gen+next+newport+beach+december+2009&ct=clnk](http://webcache.googleusercontent.com/search?hl=en&gbv=2&gs_l=hp.3...5609123031101235311411411013210101141185917121910.frgbld.&q=cache:RawasIFpgsJ:http://www.gen-next.org/programs/past_programs?datemin=1230796800&datemax=1262332800+kirk+gen+next+newport+beach+december+2009&ct=clnk).

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1 the expenses would have existed irrespective of Kirk's candidacy. Accordingly, we recommend  
2 that the Commission find no reason to believe that the Committee, Senator Mark Kirk, Dorothy  
3 McCracken, Robert Edward Vail, Jr., The Patterson Group and Van Ness Communications  
4 violated 2 U.S.C. § 439a(b) by converting campaign funds to "personal use" through payments  
5 for travel, meals, transportation, and lodging.

6 **B. The Committee Properly Disclosed its Disbursements to Patterson Group**

7  
8 The Complaint further alleges that Kirk, McCracken, and Vail may have deliberately  
9 concealed the recipients of the Committee's campaign disbursements and expenditures based on  
10 the Committee's failure to disclose Patterson Group's payments to Van Ness in its 2009-10  
11 filings with the Commission. Compl., ¶¶ 5, 8, 18. But neither the Act nor the Commission's  
12 regulations require authorized committees to report expenditures or disbursements to their  
13 vendors' sub-vendors.<sup>13</sup> See 2 U.S.C. § 434(b)(5)(A); 11 C.F.R. § 104.3(b)(4)(i)(A). To the  
14 contrary, the Commission has concluded that a committee need not separately report its  
15 consultant's payments to other persons — such as those payments for services or goods used in  
16 the performance of the consultant's contract with the committee. See generally Advisory Op.  
17 1983-25 (Mondale for President).

18 In that advisory opinion, the Commission considered several facts as significant in  
19 determining whether the corporation was a vendor of media services: the corporation had a legal  
20 existence separate and distinct from the committee; its principals did not hold any staff positions

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<sup>13</sup> The Office of the General Counsel and the Office of Compliance issued a memorandum explaining the requirement that committees, in three specified scenarios, disclose (as a memo text entry on Schedule B of its reports) the entity that provided the goods or services to the committee when the committee pays an intermediary (staff person, candidate, or credit card company). See Request for Guidance from the Commission, Pursuant to Directive 69, regarding Itemization of Ultimate Payee of Committee Disbursements ("LRA # 912, Itemization of Ultimate Payee") (Dec. 14, 2012). The Commission recently approved a notice of a draft interpretive rule on this topic seeking public comment by March 4, 2013. See "Draft Interpretive Rule on Reporting Ultimate Payees of Political Committee Disbursements" (Jan. 31, 2013). This matter does not involve any of three scenarios discussed in LRA #912 and the draft interpretive rule.

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1 within with committee; the committee and corporation conducted negotiations for the contract at  
2 arms-length; the corporation was not required to devote its "full-efforts" to the contract with the  
3 committee and expects to have other contracts with other entities; and the committee will have  
4 no interest in the other contracts. Advisory Op. 1983-25 at 3.

5 Here, the record reflects that Patterson Group is a vendor of media services and is a  
6 separate business entity from the Committee. Vail has been operating Patterson Group as a sole-  
7 proprietorship since 1998, well before Kirk's 2010 senate campaign began and before Vail first  
8 met Kirk in 1999. Vail first provided media services to Kirk in his 2006 and 2008 congressional  
9 campaigns. Vail Resp. at 1; Committee/Kirk Resp. at 3. Vail, as a self-employed media  
10 professional, has provided media services to various clients, including national advertising  
11 agencies and other political campaigns since the 1970s. Vail Resp. at 1. Vail asserts that,  
12 through Patterson Group, he provided media services for another candidate's congressional race  
13 in 2010. *Id.* In addition, the Committee asserts that in August 2010, it added another media  
14 vendor to the campaign. Committee/Kirk Resp., Ex. A. ¶ 4. The record here shows that  
15 Patterson Group was not working exclusively for the Committee in 2010. There is no  
16 information available, and the Complaint has not alleged, that Vail held any position on the  
17 Committee or that the Committee has any interest in Vail's or Patterson Group's contracts with  
18 others. Based on the sworn affidavit of its campaign manager, Elk, averring to the type and  
19 scope of the media services performed by Patterson Group for the 2010 senate campaign, and on  
20 the Committee's 2010 reports, disclosing payments to Patterson Group from October 2009  
21 through August 2010, it appears that the Committee and Patterson Group had entered into an  
22 arms-length transaction. Committee/Kirk Resp., Ex. A. ¶¶ 4-5; *see also* Kirk for Senate  
23 Amended 2010 12 Day Pre-Primary Report (Mar. 24, 2011); Amended 2010 April Quarterly

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1 Report (Sept. 16, 2010); 2010 July Quarterly Report (Jul. 15, 2010); Amended 2010 October  
2 Quarterly Report (Feb. 7, 2011).

3 Thus, it appears that Patterson Group functioned as a media vendor, separate and distinct  
4 from the Committee. The Committee, therefore, was only required to report and adequately  
5 describe disbursements to Patterson Group, and not its sub-contractor Van Ness. See Advisory  
6 Op. 1983-25. Accordingly, we recommend that the Commission find no reason to believe that  
7 the Committee violated 2 U.S.C. § 434(b) in connection with its reporting of disbursements to its  
8 media vendor.

9 **IV. RECOMMENDATIONS**

- 10 1. Find no reason to believe that Kirk for Senate and Frank Considine in his official  
11 capacity as treasurer, Senator Mark Kirk, Dorothy McCracken, Robert Edward  
12 Vail, Jr., The Patterson Group and Van Ness Communications violated 2 U.S.C.  
13 § 439a(b) by converting campaign funds to "personal use" based on the theory  
14 that McCracken was a "family member" of Sen. Kirk, and that she, through Van  
15 Ness and Patterson Group, did not provide *bona fide* services at fair market value  
16 to the campaign.  
17  
18 2. Dismiss the allegations that Kirk for Senate and Frank Considine in his official  
19 capacity as treasurer, Senator Mark Kirk, Dorothy McCracken, Robert Edward  
20 Vail, The Patterson Group and Van Ness Communications violated 2 U.S.C.  
21 § 439a(b) by converting campaign funds to "personal use" through payment for a  
22 gym membership. See *Heckler v. Chaney*, 470 U.S. 821 (1985).  
23  
24 3. Find no reason to believe that Kirk for Senate and Frank Considine in his official  
25 capacity as treasurer, Senator Mark Kirk, Dorothy McCracken, Robert Edward  
26 Vail, Jr., The Patterson Group and Van Ness Communications violated 2 U.S.C.  
27 § 439a(b) by converting campaign funds to "personal use" through payments for  
28 travel, meals, transportation, lodging, a dental bill, clothing, and cosmetics.  
29  
30 4. Find no reason to believe that Kirk for Senate and Frank Considine in his official  
31 capacity as treasurer violated 2 U.S.C. § 434(b).  
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33 5. Approve the attached Factual and Legal Analyses.  
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35 6. Approve the appropriate letters.

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7. Close the file.

3-8-13  
Date

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